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In the Supreme Court of the United States

OCTOBER TERM, 1982

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
NATIONAL TREASURY EMPLOYEES UNION

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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QUESTION PRESENTED

Whether the Federal Labor Relations Authority reasonably determined that 5 U.S.C. (Supp. V) 7101 *et seq.*, which entitles a federal employee representing a union in collective bargaining with his employing agency to his usual pay from that agency, likewise entitles the employee to a per diem allowance and reimbursement from the agency for travel expenses incurred in connection with such bargaining.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 672 F.2d 732. The decision and order of the Federal Labor Relations Authority (Pet. App. 15a-34a) is reported at 4 F.L.R.A. No. 40.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1982 (Pet. App. 12a-13a), and a timely petition for rehearing was denied on July 13, 1982 (Pet. App. 14a). On October 1, 1982, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including November 10, 1982. The petition was filed on that date and was granted on January 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7101 *et seq.*, and Chapter 57, subchapter I of Title 5 of the U.S. Code, are set forth as an addendum to this brief.

STATEMENT

A. Labor-Management Relations In The Federal Government, With Emphasis On Official Time And Payment Of Travel And Per Diem Expenses To Employee Union Negotiators For Collective Bargaining Negotiations

1. The Federal Labor Relations Authority ("the Authority" or "FLRA") was established effective January 1, 1979, as an independent agency in the executive branch of the federal government. Reorganization Plan No. 2 of 1978, 3 C.F.R. 323, 327-29 (1979), *reprinted in* 5 U.S.C. (Supp. V) app. at 428, 430-33. The Authority administers Title VII of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1191, 5 U.S.C. (Supp. V) 7101 *et seq.* ("the Labor Statute"), which became effective on January 11, 1979.

Before enactment of the Labor Statute, federal government labor-management relations were governed by Executive orders. Exec. order 10988 was the first effort to establish throughout the executive branch a legal framework for such labor relations.[1] The order permitted federal agencies to accord three levels of recognition to labor organizations, depending on the labor organization's level of support in the agency. Two of these levels—informal and formal recognition—authorized a labor organization respectively to meet with agency officials to "present . . .

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[1] Exec. order 10988, 3 C.F.R. 521 (1959-1963 Compilation), *reprinted in* Subcomm. on Postal Personnel and Modernization, of the Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 1211 (Comm. Print No. 96-7) ("Legis. Hist.").

its views on matters of concern" to its members, and to "consult" with agency management in the agency's establishment of working conditions. The third level, exclusive recognition, required an agency to, *inter alia*, negotiate a collective bargaining agreement with a labor organization. Exec. order 10988, sections 4-6, Legis. Hist. at 1212-14. The preamble to the Executive order recognized that employee participation in the establishment of working conditions "contributes to the effective conduct of public business," but did not endorse the collective bargaining process itself. No central authority was created to administer the order.

Section 9 of Exec. order 10988 provided that labor-management consultations and meetings "shall, whenever practicable, be conducted on official time. . . ."[2] However, under section 9, agencies could require collective bargaining negotiations with an exclusive representative to take place during the non-duty hours of the employees representing the union. Thus, official time was encouraged for meetings and consultations, but not for collective bargaining negotiations. This dichotomy was explained

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[2] The term "official time" is not defined in Exec. order 10988, subsequent Executive orders, or the Labor Statute itself. The phrase is also used in Title I of the Foreign Service Act of 1980, Pub. L. No. 96-465, Chap. 10, 94 Stat. 2128, 2142, 22 U.S.C. (Supp. V) 4118(d), in connection with collective bargaining negotiations conducted under that law. It is also referenced in regulations allowing a federal employee "official time" to take certain actions in connection with administrative proceedings. 29 C.F.R. (1982) 1613.214 (b) (an employee is allowed "a reasonable amount of official time to present [an equal employment opportunity] complaint if he is otherwise in an active duty status"); 5 C.F.R. (1983) 752.404(c) (an agency shall give an employee "a reasonable amount of official time" to prepare a response to a proposed adverse action by a federal agency). The term is not defined in any of these sources either. However, the Office of Personnel Management has defined "official time" in a Federal Personnel Manual letter as being "all time granted an employee by the agency to perform representational functions . . . when the employee would otherwise be in a duty status without charge to leave or loss of pay, and shall be considered hours of work." FPM Letter 711-161 (July 31, 1981).

on the basis that agency management could control the length of meetings and consultations, but not the length of bargaining sessions. Report of the President's Task Force on Employee-Management Relations in the Federal Service accompanying the issuance of Exec. order 10988 at 26 (November 30, 1961), Legis. Hist. at 1203.

In response to inquiries from agency officials, the Comptroller General of the United States ruled that, in the absence of legislation, employees representing labor organizations are not entitled to a per diem allowance and travel reimbursement from the agency for travel costs incurred in connection with collective bargaining under the order.[3] 45 Comp. Gen. 454 (1966); 44 Comp. Gen. 617 (1965). The Comptroller General viewed such employees to be acting primarily in the interest of the labor organization involved, not the federal government. 44 Comp. Gen. at 618. The Comptroller General's position was initially applied to meetings and consultations as well as to collective bargaining negotiations.

The Comptroller General subsequently modified these decisions. In 46 Comp. Gen. 21 (1966), the Comptroller General considered Civil Service Commission ("CSC") guidelines under which an agency could pay travel expenses of employee labor organization representatives attending employee-management meetings if the agency could certify that the meeting was "primarily in the interest of the Government" (*id.*). However, travel expenses to attend negotiation sessions were not, as a general rule, payable under the CSC guidelines (*id.*). The Comptroller General found that the guidelines established adequate standards to govern an agency's discretion in making travel payments. Accordingly, the Comptroller

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[3] Under 31 U.S.C.A. (West Supp. 1982) 3529, the Comptroller General is authorized to issue decisions on questions from agencies concerning payments to be made by the agency, or vouchers submitted to the agency for payment. This provision in its present form is essentially unchanged from what it was when the Comptroller General issued his decisions set forth herein. *See* 31 U.S.C. (1976) 74, 82d.

General ruled that agencies could make such payments consistent with the CSC guidelines (*id.* at 22).

2. Exec. order 10988 was superseded in January 1970 by Exec. order 11491. 3 C.F.R. 861 (1966-1970 Compilation), Legis. Hist. at 1244. The new order created the Federal Labor Relations Council ("FLRC" or "Council") as the central authority to administer the program. *Id.* at 864, Legis. Hist. at 1246. The FLRC was composed of three incumbent management officials (the Chairman of the Civil Service Commission, the Secretary of Labor, and the Director of the Office of Management and Budget), who served in an *ex officio*, part-time capacity. *Id.* The order empowered the Council to, *inter alia*, decide major policy issues arising under the order and adjudicate cases involving unfair labor practices, negotiability issues, and exceptions to arbitration awards.[4]

The preamble of Exec. order 11491 carried over its predecessor's general endorsement of employee participation in the establishment of working conditions, recognizing that the "efficient administration of Government" benefits therefrom. But the order again stopped short of endorsing the collective bargaining process itself as the specific means for achieving this benefit.[5]

Section 20 of Exec. order 11491 initially prohibited employees representing labor organizations from being on official time when negotiating a collective bargaining agreement with an agency. The prohibition was based on the view that an employee negotiating such an agreement is working on behalf of the labor organization, and "should not be in a duty status when so engaged." Study

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[4] This Court discussed the labor relations scheme established under Exec. order 11491, as amended, in *National Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 273-75 (1974).

[5] Only the "exclusive" form of labor organization recognition was retained from the old order, although "national consultation rights" for a labor organization, analogous to formal recognition under Exec. order 10988, were created (*id.* at secs. 9 and 10, Legis. Hist. at 1249-50).

Committee Report and Recommendations, August 1969, Which Led To Issuance Of Executive Order 11491 at 9, Legis. Hist. at 1236.

Section 20 of Exec. order 11491 was amended approximately one year later to authorize limited amounts of official time for employee union representatives in collective bargaining agreement negotiations. Exec. order 11616, 3 C.F.R. 605, 608 (1971-1975 Compilation), Legis. Hist. at 1268, 1270. Specifically, unions and agencies could negotiate official time allotments for employees representing unions, up to a maximum of either forty hours, or fifty percent of the time spent in negotiations (*id.*). The authorization of limited amounts of official time for bargaining was not to be construed as an authorization for "overtime, premium pay, or travel expenditures."[6] FLRC, Report and Recommendations on the Amendment of Executive Order 11491 (1975), Legis. Hist. at 1258, 1264.

3. Criticism of the exclusively management composition of the FLRC led to repeated recommendations for change.[7] These recommendations came to fruition with establishment of the Authority under Reorganization Plan No. 2 of 1978 and the Labor Statute. During legislative consideration of the Labor Statute dissatisfaction

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[6] However, the FLRC did hold that agency payment of travel expenses of employees representing unions at grievance and arbitration hearings could be negotiated. *National Treasury Employees Union and Dept. of the Treasury, U.S. Customs Service, Region VII*, 5 F.L.R.C. 250 (1977). The FLRC was never presented with the issue whether parties could negotiate over bargaining proposals that agencies pay travel and per diem costs of employee union representatives at collective bargaining negotiations.

[7] *See, e.g.*, Report of the Committee on the Law of Federal Government Employee Relations, *reprinted in* ABA Labor Relations § 188 (1977); H.R. 13, 95th Cong., 1st Sess. (1977), Legis. Hist. at 121, 131; H.R. 1589, 95th Cong., 1st Sess. (1977), Legis. Hist. at 183, 191-92; and Report of the Comptroller General on H.R. 11280, *reprinted in* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 104, 106 (1978), Legis. Hist. at 711, 713.

was expressed with the labor relations situation in the federal government under Exec. order 11491, as amended. Congressman Clay stated: "Title VII [i.e., the Labor Statute] obviously represents congressional dissatisfaction with the state of labor-management relations in the Federal Service." The Congressman pointed to "the provisions of the [Executive] order and, especially, the straightjacket interpretation of them by the Federal Labor Relations Council" as the cause of the unsatisfactory Executive order program. 124 Cong. Rec. 29,187 (1978), Legis. Hist. at 931. *See also* 124 Cong. Rec. 29,200 (1978) (remarks of Congressman Ford), Legis. Hist. at 958; *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1145 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982).

The Authority was created as an independent and neutral agency in the executive branch, for the purpose of interpreting and administering the Labor Statute. The Authority is composed of three full-time members appointed by the President with the advice and consent of the Senate. 5 U.S.C. (Supp. V) 7104(a), (b). Its role and functions under the Labor Statute are analogous in many respects to those of the National Labor Relations Board ("Board" or "NLRB") in the private sector under the National Labor Relations Act ("NLRA"), 29 U.S.C. 151 *et seq.* Thus, the Authority is empowered to, *inter alia*, determine appropriate units for labor organization representation, conduct representation elections, resolve unfair labor practice complaints, rule on exceptions to arbitrators' awards, and decide issues relating to the statutory duty to bargain in good faith. 5 U.S.C. (Supp. V) 7105(a)(2)(A), (B), (E), (G), and (H), respectively.

Under the Labor Statute unions and federal agencies negotiate on conditions of employment, as defined in 5 U.S.C. (Supp. V) 7103(a)(14), unless a bargaining proposal is inconsistent with law, rule or regulation. 5 U.S.C. (Supp. V) 7103(a)(12), 7114, 7116(a)(5), (b)(5), and 7117(a). Strikes and certain other forms of

concerted activities by federal employees are illegal (5 U.S.C. 7311(3), 18 U.S.C. 1918(3)) and constitute an unfair labor practice under the Labor Statute (5 U.S.C. (Supp. V) 7116(b)(7)(A)). Bargaining impasses are resolved by the Federal Service Impasses Panel, an entity within the Authority. 5 U.S.C. (Supp. V) 7119.

Congress vested considerable discretion in the Authority to administer the Labor Statute. For example, Congress directed the Authority to "provide leadership in establishing policies and guidance" in matters arising under the Labor Statute, and to "take such . . . actions as are necessary and appropriate to effectively administer the provisions of the [Labor Statute]." 5 U.S.C. (Supp. V) 7105(a)(1) and (a)(2)(I), respectively. Furthermore, Congress granted the Authority broad powers to promulgate regulations to carry out the provisions of the Labor Statute. 5 U.S.C. (Supp. V) 7134.

As to the policy toward the collective bargaining process in the federal government, Congress found that the process itself safeguards the public interest and contributes to the effective conduct of public business. 5 U.S.C. (Supp. V) 7101(a). Congress therefore concluded that "labor organizations and collective bargaining in the civil service are in the public interest." *Id.* As indicated at 3 and 5, *supra*, the Executive orders preceding the Labor Statute stopped short of such an endorsement. Also, in enacting 5 U.S.C. (Supp. V) 7131(a), Congress abolished restrictions on the amount of official time available for employee union negotiators that had previously been imposed under section 20 of Exec. order 11491, as amended. Under section 7131(a) of the Labor Statute, an employee union negotiator is authorized official time without limit to negotiate a collective bargaining agreement with an employing agency.[8] Congress made no ex-

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[8] The number of employee union representatives authorized official time under sec. 7131(a) is limited to the number of repre-

press reference, either in the language of the Labor Statute itself or its legislative history, to the availability or unavailability of travel expenses and per diem allowances to employee union negotiators.

B. Facts And Proceedings Below

1. In November 1978, officials of petitioner Bureau of Alcohol, Tobacco and Firearms ("BATF") notified the president of the National Treasury Employees Union, Chapter 81 ("union"), that it intended to relocate BATF's Lodi, California, area office to Sacramento and retain a reduced post of duty at a different location in Lodi (Pet. App. 2a). The union is the exclusive representative of all bargaining unit employees affected by the relocation. In December 1978, the union chapter president advised BATF that the union wished to negotiate the decision to move the office, or alternatively the impact the move would have on bargaining unit employees (Pet. App. 22a). The union named Donald Pruett, a union steward in BATF's Fresno area office who lived in Madera, California, to represent it in the matter (*id.*).

Pruett informed BATF by letter that he wished to begin negotiations, and arrangements were made by BATF officials and Pruett to meet in Sacramento and view the facilities (Ct. App. 147).[9] It was agreed that various BATF management officials would meet with Pruett at 9:30 a.m. on February 23, 1979 (Ct. App. 147-149). Several days before the scheduled meeting, Pruett spoke with two BATF management officials who were to be in Sacramento. He asked the officials whether the

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sentatives designated by agency management for the negotiations. 5 U.S.C. (Supp. V) 7131(a); *National Fed'n. of Fed'l Employees* v. *FLRA*, 652 F.2d 191 (D.C. Cir. 1981).

[9] "Ct. App." refers to the pages of the administrative record before the Authority, submitted to the Ninth Circuit Court of Appeals in the form of three bound volumes. The appendix to BATF's Petition for Writ of Certiorari ("Pet. App.") is serving in lieu of a Joint Appendix.

meeting could be considered as part of a "quarterly" meeting under the parties' collective bargaining agreement, or whether he could take "bank time," which would have enabled him to remain in a work status during the day of the meeting (Pet. App. 23a). Pruett's request was denied, and he was advised by telephone before the meeting that he would have to take some form of personal leave to attend the meeting (*id.*). This denial was followed up by letters after the meeting, which stated that it was not BATF's policy to grant official time for mid-term negotiations like those here involved, nor was it agency policy to reimburse employees for any expenses incurred in connection with such negotiations (*id.*, fn. 5).

As scheduled, the BATF officials and Pruett, who had to take annual leave for the day, met in the morning on February 23 at the new Sacramento office (Pet. App. 23a-24a). Pruett and the management representatives examined the Sacramento office facilities for about an hour, after which they drove to Lodi, had lunch, and met at the new Lodi post of duty office. There they again examined the various office facilities, this time for about thirty to forty-five minutes (Pet. App. 24a-25a). The parties then went to the old Lodi area office, where they discussed the impact of the move on bargaining unit employees (Pet. App. 25a). The session at the old Lodi office lasted approximately an hour to an hour and a half (Ct. App. 76). A summary of the day's discussions was subsequently prepared by BATF in a memorandum to Pruett. Pruett, who had left his home in Madera at 6:00 or 6:15 a.m. that day, returned home about 5:45 p.m., having driven 303 miles in his own vehicle (Pet. App. 25a; Ct. App. 44-45).

2. In June 1979, the union filed an unfair labor practice charge, pursuant to 5 U.S.C. (Supp. V) 7118 and 5 C.F.R. (1980) Part 2423, asserting that BATF had improperly compelled Pruett to take annual leave for the February 23 negotiations (Ct. App. 91). Subsequently the General Counsel of the Authority issued a complaint and notice of hearing based on the charge, alleging that BATF

violated 5 U.S.C. (Supp. V) 7116(a)(1) and (8) (Pet. App. 21a).[10] The basis for the complaint was that BATF had failed and refused to comply with 5 U.S.C. (Supp. V) 7131 by denying Pruett official time in which to engage in negotiations on the impact and implementation of BATF's proposal to relocate its Lodi area office (*id.*). A hearing on the complaint was held before an Authority Administrative Law Judge ("A.L.J."), at which time the complaint was amended without objection to clarify that "official time," as referenced in the complaint, included the payment of travel and per diem expenses (*id.*, fn. 1).

Following the hearing and submission of briefs, the A.L.J. issued a recommended decision and order based on the Authority's *Interpretation and Guidance*, 2 F.L.R.A. 265 (1979), set forth at Pet. App. 35a-47a.[11] In its Interpretation and Guidance, issued shortly before the General Counsel issued his complaint in this case, the Authority prescribed the obligation under the Labor Statute of an agency to make travel and per diem payments to employee union representatives in connection with collective bargaining negotiations.[12]

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[10] These subsections provide in relevant part as follows:

§ 7116. Unfair labor practices

(a) For the purposes of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . .

(8) to otherwise fail or refuse to comply with any provision of this chapter.

[11] The Authority's Interpretation and Guidance was issued pursuant to 5 U.S.C. (Supp. V) 7105 and 7135(b), and 5 C.F.R. (1978) 2410.3. 44 Fed. Reg. 42,778 (July 20, 1979). In response to the Authority's invitation in the Federal Register to interested persons to express their views, twenty-two federal agencies, 8 federal employee unions and 3 private groups or individuals submitted comments to the Authority.

[12] The Authority also stated in the Interpretation and Guidance that employee union representatives involved in mid-term bargain-

The Authority held first that the reference to "official time" in 5 U.S.C. (Supp. V) 7131(a) confers an entitlement on an employee union negotiator to those forms of compensation apart from salary, such as travel and per diem payments, to which the employee normally would be entitled if the employee were performing regularly assigned duties (Pet. App. 42a). The Authority next noted that, while neither the Labor Statute nor its history expressly references travel or per diem payments for employee union negotiators, Congress repeatedly rejected efforts to carry over to the Labor Statute the provisions of Exec. order 11491, as amended, which did not authorize such payments and severely limited the amount of official time that could be granted for negotiation activities (Pet. App. 42a, fn. 6). Also, the Authority observed that the encouragement of collective bargaining is a stated purpose of the Labor Statute, unlike the Executive order (Pet. App. 43a).

Further, the Authority concluded that because Congress in the Labor Statute found the collective bargaining process to be in the public interest, participation in negotiations constitutes "official business" of the federal government under 5 U.S.C. 5702(a), thus warranting payment of travel and per diem expenses under that section (*id.*). The Authority also relied on Congress' intent to more nearly equalize through the Labor Statute the capabilities of the union side of the bargaining table with those of management (whose negotiators are uniformly paid travel expenses and per diem), in order to make the collective bargaining process more effective (Pet. App. 43a-44a). Finally, the Authority noted its interpretation of 5 U.S.C. (Supp. V) 7131(c), which is identical to the pertinent language in section 7131(a), as entitling employees on official time in Authority proceedings to travel and per diem expenses. 5 C.F.R. (1981) 2429.13.

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ing (i.e., negotiations arising from circumstances occurring during the term of a basic agreement) are entitled to official time under sec. 7131(a).

Based on this interpretation, the A.L.J. concluded that BATF's refusal to pay travel and per diem expenses to Pruett, contrary to the requirement of section 7131 of the Labor Statute as interpreted by the Authority, constituted unfair labor practices in violation of section 7116(a)(1) and (8) of that statute (Pet. App. 32a).[13]

BATF filed exceptions to the A.L.J.'s recommended decision and order with the Authority. Thereafter, the Authority issued its decision and order affirming the A.L.J.'s rulings, and adopting his findings, conclusions, and recommendations. The Authority accordingly ordered BATF to grant Pruett official time for the negotiations conducted on February 23, and to pay his travel and per diem expenses for the day (Pet. App. 16a-17a).

3. On appeal, a panel of the Ninth Circuit unanimously rejected BATF's arguments as to the travel and per diem aspect of the Authority's decision and order, and enforced the Authority's order in full (Pet. 1a-11a).[14] Finding the Authority's ruling to be "reasoned and supportable," the court of appeals approved the Authority's conclusion that employees on official time are properly considered to be on "official business" of the government, and thus entitled to travel and per diem payments under 5 U.S.C. 5702(a). The court held that Congress' express endorsement of the collective bargain-

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[13] The A.L.J. also ruled that the February 23 discussions were in fact negotiations within the meaning of that term under sec. 7131(a) of the Labor Statute; that the operative events giving rise to the unfair labor practices occurred after the effective date of the Labor Statute; and that Pruett's failure to submit a travel voucher for his expenses was not a prerequisite for finding violations of the Labor Statute, due to the obvious futility of such an action in light of BATF's actions in the case (Pet. App. 29a-32a). These conclusions, affirmed by the Authority, are not at issue before the Court.

[14] The Ninth Circuit also unanimously enforced the portion of the Authority's decision and order which held that the mid-term negotiations here involved were covered under sec. 7131(a), as referenced at 11, fn. 12, *supra*. BATF does not challenge the Ninth Circuit's ruling before this Court.

ing process as in the public interest warranted deeming negotiations as official business of the government. Congress' policy of favoring the collective bargaining process in its entirety also justified the Authority's effort to equalize more nearly the positions of the parties at the bargaining table.

Further, the court found no merit to BATF's claim that the availability of travel and per diem payments would decrease a union's willingness to agree to proposals at the bargaining table. The court pointed out that a dilatory union could be charged with bad-faith bargaining under the Labor Statute, or the Federal Service Impasses Panel could be brought in to resolve a bargaining impasse under 5 U.S.C. (Supp. V) 7119. In any event, the court noted, travel and per diem payments would, if anything, serve to equalize the pressure to agree at the bargaining table because management negotiators have received such payments all along (Pet. App. 10a-11a). Finally, the court observed that the Authority was interpreting section 7131(a) in a manner fully consistent with the way it had interpreted the same relevant language in section 7131(c) of the Labor Statute (Pet. App. 9a). A petition for rehearing and suggestion for rehearing *en banc* by BATF was denied by the court, with no judge requesting a vote on the suggestion for rehearing *en banc* (Pet. App. 14a).

SUMMARY OF ARGUMENT

1. Congress expressly mandated in 5 U.S.C. (Supp. V) 7123(c) that the standard of judicial review of an Authority order is whether the order is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). This standard requires a reviewing court to accord an agency's interpretation of its organic statute more than the "mere deference or weight" applicable in the case of an agency interpretive rule. *Batterton* v. *Francis*, 432 U.S. 416, 426 (1977). The reasoning of the Authority's Interpre-

tation and Guidance was subjected to judicial review by BATF and other agencies only after the Authority considered and applied the reasoning in the specific adjudication here involved, which is reviewable in court exclusively under 5 U.S.C. (Supp. V) 7123. Thus, BATF must challenge, and this Court must review, the Authority's action in this case in accordance with the conditions established in 5 U.S.C. (Supp. V) 7123(c), including application of the "arbitrary and capricious" standard of review.

Application of this narrow review standard advances an important purpose of Congress in enacting the Labor Statute: the establishment of the FLRA as the independent agency possessing considerable latitude and discretion in applying the Labor Statute, so that there could be a fresh start in federal sector labor relations over the Executive order program rejected by Congress as unsatisfactory.

Assuming *arguendo* that the broader interpretive rule review standard applies, the Authority's construction of the Labor Statute as requiring travel and per diem payments to employee union negotiators is nonetheless entitled to considerable deference from the Court. The Authority's reasoning in reaching this conclusion evidences "thoroughness, validity, and consistency of an agency reasoning," and moreover, the Authority is "precisely the type of agency to which deference should presumptively be afforded," in that it has been authorized by Congress to formulate general policy in administering the Labor Statute. *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981).

BATF's argument that the Authority is not entitled to deference because the Authority's decision is based largely on a law it does not administer is without merit. The Authority's conclusion that Congress viewed collective bargaining as "official business" of the federal government, thus warranting travel and per diem payments under 5 U.S.C. (& Supp. V) 5702, was but one of several bases

for the Authority's decision. As properly recognized by the court below, the Authority's decision was supported by the conclusion that travel and per diem payments to employee union negotiators are consistent with Congress' intent under the Labor Statute itself. In any event, to the extent that 5 U.S.C. (& Supp. V) 5702 was considered by the Authority, it was scarcely the focal point of the Authority's inquiry. That section merely establishes the general, undefined standard of "official business" as warranting travel and per diem payments. Whether the standard was met in this case was resolved by the Authority by considering the Labor Statute exclusively.

2. The Authority reasonably concluded that it is consistent with Congress' intent in the Labor Statute to require agencies to pay the travel and per diem costs of employee union negotiators. By mandating that an employee union negotiator engaged in bargaining be on "official time," or "paid time" as it was called in the Labor Statute's legislative history, Congress intended the employee to be "on the clock," as though the employee were performing regularly assigned duties during negotiations. Because official time spent on negotiations is to be considered as hours of work, it was reasonable for the Authority to conclude that Congress intended an employee union negotiator, who must receive a normal day's pay from his employing agency for negotiating, to also receive attendant reimbursements such as travel and per diem payments just as an employee performing regularly assigned duties would.

This conclusion is also supported by examining other provisions of the Labor Statute in conjunction with the official time provision, section 7131(a). Section 7101(a) of the Labor Statute, unlike the preceding Executive orders, expressly endorses labor organizations and the collective bargaining process itself as being in the public interest. More than simply endorsing collective bargaining and labor organizations, however, Congress also acted to assist the collective bargaining process by, *inter*

alia, compensating employee union negotiators while at the bargaining table, pursuant to section 7131(a) of the Labor Statute. Thus, the Labor Statute taken as a whole reflects Congress' view that it is the product of the differing perspectives of union and management, and not just management's side of the bargaining table, which makes for a more efficient government and is in the best interest of the government. Because management negotiators receive travel and per diem payments as well as their pay, it is consistent with Congress' intent for the Authority and the court below to conclude that employee union negotiators should receive the same treatment. Moreover, in view of the fact Congress clearly intended to compensate employee union negotiators for their services at the bargaining table, it is reasonable to infer an intent to facilitate their ability to reach the site where the services are to be performed.

The effort of BATF to apply a private sector analogy, under which each side pays its own way to the bargaining table, is inapposite because it ignores Congress' intent to apportion federal funds to both sides of a relationship that is beneficial in its entirety for government operations. Indeed, the inapplicability of a private sector analogy is no more evident than from an examination of section 7131(a) itself. There, Congress took the unprecedented step of statutorily mandating employer compensation (official time) of employee union negotiators, where no similar statute exists in the private sector. The approach of apportioning federal funds also serves to more nearly equalize pressures on both sides to agree at the bargaining table.

The history of this issue prior to the Labor Statute also supports the Authority's decision and its affirmance by the court below. The prohibition on travel and per diem payments under the Executive orders was predicated on the view that an employee negotiating on behalf of a union acted primarily in the interest of the union. Congress rejected this view of the collective bar-

gaining process when it recognized in the Labor Statute that both union and management negotiators, as participants in that process, act in the interest of a more efficient government. Because Congress eliminated the basis on which travel and per diem payments were denied under the Executive orders, it is consistent with Congress' intent for the Authority and the court below to hold that travel and per diem payments by agencies are required under the Labor Statute.

None of the general principles of statutory construction relied on by BATF, to the effect that Congress must have been aware of the Executive order practice and intended to ratify the practice by failing to expressly reject it, warrant a contrary result. These principles are not applicable to a situation like this, where Congress has acted for the first time in an area to repudiate prior executive branch policies. Similarly, the principle of construction established in *United States* v. *Zazove*, 334 U.S. 602, 616-17 (1948), that a liability is not to be imposed on the government except upon a clear statement of congressional intent, is inapposite. The principle has been applied only to a very restricted class of cases in which a statute dealing exclusively with financial matters is at issue. The Labor Statute is not such a law. In any event, the rule is not applicable if, as in this case, there are "cogent reasons" for not applying it.

3. Travel and per diem payments to employee union negotiators are called for under 5 U.S.C. (& Supp. V) 5702, as well as under the Labor Statute itself. The Comptroller General has adopted a flexible, pragmatic standard for determining what constitutes "official business" justifying travel and per diem payments under that section. If the purpose of the travel is "sufficiently in the interest of the United States," it constitutes "official business." 44 Comp. Gen. 188, 189 (1964). Thus, employee travel to a hearing on the employee's own performance appraisal appeal, and to conferences and conventions, has been construed as "official business" under that section.

The direct benefit to government operations resulting from collective bargaining is similar in nature and degree to the benefits derived from other activities held to constitute "official business." Collective bargaining mandated by statute should therefore be considered as "official business" (i.e., "sufficiently in the interest of the United States") under 5 U.S.C. (& Supp. V) 5702, as the Authority and the court below properly concluded.

ARGUMENT

I. An Order Of The Authority Must Be Affirmed By A Reviewing Court If Supported By A Rational Basis

A. *Congress, In Enacting The Labor Statute, Expressly Stated Its Intent That A Court's Review Of An Authority Order Be Restricted To Determining Whether The Order Is Supported By A Rational Basis*

1. It is well settled that the manner and extent of judicial review of agency action is delineated by the legislation providing for such review. *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 404 (1940). The case here under review involves an Authority decision and order in an unfair labor practice proceeding under 5 U.S.C. (Supp. V) 7116, 7118. The nature and scope of judicial review of such a decision and order is accordingly established by 5 U.S.C. (Supp. V) 7123, the provision of the Labor Statute establishing appellate jurisdiction to review Authority orders. Section 7123(c) states in relevant part that "[r]eview [by a court] of the Authority's order shall be on the record in accordance with section 706 of [Title 5 of the United States Code]."

In turn, 5 U.S.C. 706 provides that a "reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency ac-

tion." However, a reviewing court is to set aside agency action, findings, and conclusions only if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. 706(2)(A). This standard of review has been held by the Court to require according more than "mere deference or weight" to an agency's interpretation of a statute it is responsible for administering. *Batterton* v. *Francis*, 432 U.S. 416, 426 (1977). Rather, the standard requires a reviewing court to affirm agency action if it is supported by a rational basis, regardless of whether the reviewing court would have interpreted the statute differently had it been presented with the matter *de novo*. *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). *See also, Department of Defense* v. *FLRA*, 659 F.2d 1140, 1162, n.121 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982); *Northwest Airlines, Inc.* v. *Goldschmidt*, 645 F.2d 1309, 1317 (8th Cir. 1981); *Ethyl Corp.* v. *Environmental Protection Agency*, 541 F.2d 1, 34 (D.C. Cir.) (*en banc*), *cert. denied*, 426 U.S. 941 (1976).

This standard, of course, is the very limited type of judicial review that is normally applied by a court in reviewing regulations issued by an agency pursuant to a delegation of legislative authority (i.e., legislative regulations). *Batterton* v. *Francis*, 432 U.S. at 426; *Board of Education of the City of New York* v. *Harris*, 622 F.2d 599, 613 (2d Cir. 1979), *cert. denied*, 449 U.S. 1124 (1981).[15] It stands in marked contrast to the broader

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[15] By specifying the applicability of 5 U.S.C. 706 to judicial review of Authority orders, Congress intended reviewing courts to adopt as limited a standard of review as this Court and others have applied in considering orders of the NLRB under 29 U.S.C. 160. *See, e.g., NLRB* v. *Int'l Assoc. of Bridge, Structural, and Ornamental Iron Workers, Local No. 103*, 434 U.S. 335, 350 (1978); *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975) (if the Board's construction of the NLRA is defensible and permissible under the NLRA, it should be affirmed).

analysis that a reviewing court undertakes when considering an agency interpretive rule. In that instance, a court merely considers the agency's interpretation of a statute as "one input in the interpretational equation," which the court may either accept or reject, depending on how persuasive the agency's reasoning is. *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969). *See also, Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

2. Based on the foregoing, BATF's claim at 28 of its brief ("Br."), that the Authority's decision and order is entitled to less deference because it is based on an interpretive rule, is clearly without merit. Assuming *arguendo* that the Interpretation and Guidance is an interpretive rule, as BATF claims, no federal agency, including BATF, challenged the regulation directly in an appropriate federal appeals court under section 7123 of the Labor Statute. *United States Department of Agriculture* v. *FLRA*, 691 F.2d 1242, 1250-51 (8th Cir. 1982) (Heaney, J., dissenting), *petit. for cert. filed sub nom. FLRA* v. *Department of Agriculture*, 51 U.S.L.W. 3625 (Dec. 13, 1982); *Pacific Gas and Electric Co.* v. *FPC*, 506 F.2d 33, 45 n.32 (D.C. Cir. 1974). Rather, BATF waited until the Authority considered and applied its Interpretation and Guidance in an unfair labor practice adjudication which could be judicially reviewed only under section 7123 of the Labor Statute. Accordingly, BATF must challenge, and this Court must review, the Authority's rationale in accordance with the conditions set forth by Congress in section 7123 of the Labor Statute. That is, review in this case must be on the basis of whether the Authority's decision is arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with law pursuant to 5 U.S.C. 706(2)(A).[16]

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[16] In discussing the appropriate standard of review, the court below referred to the interpretive rule test of *Skidmore* v. *Swift &*

Application of the narrow "arbitrary and capricious" standard of review to an Authority order based on the reasoning of an interpretive rule fulfills an important purpose of Congress in enacting the Labor Statute. In section 7123(c), Congress conferred on the Authority a broad scope of discretion in interpreting and applying the Labor Statute to matters before it. A reviewing court is expressly directed thereunder to alter the Authority's exercise of discretion only in very limited circumstances. This specific congressional intent in the judicial review area is fully consistent with Congress' broader intent in the Labor Statute to create an independent and neutral agency that would initiate a fresh start in federal sector labor-management relations. Congress' intent in this regard is best effectuated by application of the narrow standard of review to Authority orders expressly called for in section 7123(c).[17]

Co., 323 U.S. at 140. It appears clear, however, from the court's holding at Pet. App. 4a, 5a (the Authority's ruling is "reasoned and supportable," and thus "not arbitrary and capricious"), that the court actually applied the narrower "arbitrary and capricious" standard.

[17] Even assuming *arguendo* that the broader review standard applicable to interpretive rules should be applied to the Interpretation and Guidance in this case, the Interpretation and Guidance evidences "thoroughness, validity, and consistency of agency reasoning," which warrants according it deference. *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Further, the Authority, like the FEC in the case just cited, is "precisely the type of agency to which deference should presumptively be afforded." *Id.* That is, the Authority has been vested by Congress with "primary and substantial responsibility for administering and enforcing" the Labor Statute, and has been authorized to "formulate general policy with respect to the administration" of that law. *Id., quoting Buckley* v. *Valeo*, 424 U.S. 1, 109 (1976).

B. *The Fact That The Authority Considered A Statutory Provision Outside The Labor Statute Does Not Serve To Broaden The Scope Of Review Of A Court*

BATF argues that deference to the Authority is unwarranted because its decision is "based largely on construction of a statute it does not administer" (Br. 29). Specifically, BATF asserts that the Authority interpreted 5 U.S.C. (& Supp. V) 5702, providing that employees "traveling on official business" are entitled to a per diem allowance. Because the General Services Administration ("GSA"), not the Authority, is responsible for implementing 5 U.S.C. (& Supp. V) 5702, BATF contends that the Authority is not entitled to deference. This contention is without merit.

The notion that the Authority's decision was "based largely" on an interpretation of 5 U.S.C. (& Supp. V) 5702 is simply incorrect. *Division of Military and Naval Affairs, State of New York* v. *FLRA*, 683 F.2d 45, 49 (2d Cir. 1982) (Oakes, J., dissenting), *petit. for cert. filed sub nom. FLRA* v. *Division of Military and Naval Affairs, State of New York*, 51 U.S.L.W. 3596 (Dec. 16, 1982). The Authority's decision was based on several factors, chief among them the Authority's conclusion that the Labor Statute in and of itself warrants a holding that travel and per diem payments should be made to employee union negotiators. The separate conclusion, alluded to by BATF, that negotiation of a collective bargaining agreement under the Labor Statute falls within the meaning of "official business" under 5 U.S.C. (& Supp. V) 5702, was but one of these several factors.

Furthermore, to the extent that section 5702 was considered at all by the Authority, it was not the focal point of its inquiry. Rather, that section merely establishes the general and undefined standard to be met in making travel and per diem payments, i.e., "official business." To determine whether Congress intended collective bargaining negotiations to fall within the ambit of that

phrase, the Authority focused its attention exclusively on the Labor Statute. Accordingly, it cannot be said that the Authority relied to any sizeable degree on an interpretation of section 5702, such that the Authority should not be accorded the deference to which it is otherwise entitled.[18] Finally, the Authority, like the NLRB, must on occasion consider subject matters not directly within its primary area of expertise, in order to effectuate the policies established by Congress in labor legislation. This does not mean, however, that the Authority is entitled to any less deference when it construes the Labor Statute in light of other provisions in order to implement the Labor Statute's policies. *Cf. Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 500-01 (1978) (rejecting a hospital's claim that a Board decision, establishing areas where hospital employees may be solicited, is not entitled to deference because the Board is not expert in hospital administration; Congress intended the Board, not hospitals, to develop labor relations policy in the health-care industry); *American Federation of Government Employees, AFL-CIO, Local 1968* v. *FLRA*, 691 F.2d 565 (D.C. Cir. 1982), *cert. denied*, 51 U.S.L.W. 3825 (May 17, 1983); *National Treasury Employees Union* v. *FLRA*, 691 F.2d 553 (D.C. Cir. 1982) (affirming the Authority's

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[18] To our knowledge, the General Services Administration (GSA) has never asserted that collective bargaining negotiations under the Statute are not "official business" under 5 U.S.C. (& Supp. V) 5702. In response to the Authority's invitation to interested persons to submit their views on the travel and per diem issue (44 Fed. Reg. 42,778 (July 20, 1979)), GSA did not argue such a position. Further, GSA has not sought to present such a view to the Authority as an *amicus curiae* in an Authority adjudicative proceeding under the Authority's rules, 5 C.F.R. (1983) 2429.9, or to amend its own regulations implementing sec. 5702, FPMR 101-7, GSA Bulletin FPMR A-40, Supp. 1 (Sept. 28, 1981), to reflect that collective bargaining negotiations are not in its view "official business." Thus, the Authority's assessment of how the Labor Statute and sec. 5702 interrelate is not at odds with that of GSA, because GSA has never expressed a contrary view despite ample opportunity to do so.

decisions on the negotiability of promulgation of employee performance standards and identification of critical job elements, in which decisions the Authority considered statutory provisions outside the Labor Statute and regulations issued by the Office of Personnel Management).

II. The Authority Reasonably Determined That Payment Of Travel And Per Diem Expenses Under The Labor Statute Is Consistent With The Intent Of Congress In Enacting That Statute

A. *The Language Of The Labor Statute Supports The Authority's Determination*

1. The language of 5 U.S.C. (Supp. V) 7131(a), in itself, supports the Authority's holding in this case and its affirmance by the court below. Congress intended the term "official time" in section 7131(a) to mean "paid time." H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978), Legis. Hist. at 704; *National Federation of Federal Employees* v. *FLRA*, 652 F.2d 191, 194 (D.C. Cir. 1981). Therefore, employee union negotiators are viewed as "on the clock" when participating in collective bargaining negotiations, as if they were performing their regularly assigned duties. Accordingly, it was reasonable for the Authority to conclude that an employee union negotiator is entitled to receive his usual pay and attendant reimbursements, such as travel costs and a per diem allowance, just as he would were he performing his regularly assigned duties.[19]

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[19] While § 7131(a) grants official time "during the time the employee would otherwise be in a duty status," a literal reading of this phrase would lead to absurd results and should therefore be rejected. *Commissioner of Internal Revenue* v. *Brown*, 380 U.S. 563, 571 (1965). For example, assume a situation where one employee union negotiator works in a federal facility in Los Angeles on a midnight to 8:00 a.m. shift and a second negotiator works at the same facility on the 8:00 a.m. to 4:00 p.m. shift. Both travel to San Francisco for contract negotiations held from 8:00 a.m. to 4:00 p.m. Under a strictly literal view of § 7131(a), the first negotiator would not receive official time because he would

The conclusion that time spent negotiating a collective bargaining agreement on "official time" is to be considered as hours worked is buttressed by other sources as well. First, as indicated at 3, fn. 2, *supra*, the Office of Personnel Management has defined "official time" under the Labor Statute to be "hours of work." Second, section 9 of Exec. order 10988 stated that meetings and consultations between union and management were to be "conducted on official time" whenever practicable. This use of the term shows that "official time" was viewed as synonymous with work time. Third, this is also the meaning accorded the term by case law dealing with the propriety of agency discipline of federal employees who fail to account properly for their assigned hours of work. *Jones* v. *Farm Credit Administration*, 702 F.2d 160, 161-62 (8th Cir. 1983); *Pascal* v. *United States*, 543 F.2d 1284, 1287-88 (Ct. Cl. 1976). Finally, the Office of Workers Compensation Programs (formerly the Bureau of Em-

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not have "otherwise [been] . . . in a duty status" during the hours of bargaining, but the second negotiator would receive official time. Creating such an arbitrary disparity could not have been Congress' intent. It is far more reasonable to read § 7131(a) as providing that an employee receive his normal day's pay for a day spent in negotiations, regardless of the degree of precise overlap of bargaining and normal work hours.

BATF's claim (Br. 21) that Congress intended to preclude payments for travel and per diem costs, which are normally incurred during nonwork time, because Congress focused only on "the time the employee otherwise would be in a duty status," is similarly based on an overly literal reading. As just indicated, Congress' thrust in the Labor Statute was to treat employee union representatives for compensation purposes as if they were performing their normally assigned duties when involved in contract negotiations. Therefore, the employee is to receive a normal day's pay for a day spent in negotiations. Having decided to pay an employee for service as a union negotiator, it is most logical to conclude that Congress intended to provide the employee with the means of reaching the site where the services are to be performed. In short, the employee's compensation on the one hand, and travel and per diem payments on the other, are closely intertwined, and not as easily separable as BATF claims.

ployees' Compensation) of the Department of Labor ruled that an employee union negotiator is considered to be "in the performance of duty for the purposes of the [Federal Employees' Compensation Act] while he travels to or from or while he attends a negotiating session" under Exec. order 10988.[20]

2. The reasonableness of the Authority's conclusion is supported by other provisions of the Labor Statute. Section 7101(a) of the Labor Statute sets forth Congress' finding that "labor organizations and collective bargaining in the civil service are in the public interest."[21] This section, together with section 7131(a), demonstrates that Congress viewed the fruits of the collective bargain-

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[20] Department of Labor, Bureau of Employees' Compensation *FECA Program Memorandum No. 39* (July 19, 1965). The Federal Employees' Compensation Act, 5 U.S.C. (& Supp. V) 8101 *et seq.*, provides compensation to a federal employee injured "while in the performance of his duty." 5 U.S.C. (& Supp. V) 8102(a).

[21] Section 7101(a) provides, in its entirety, as follows:

§ *7101. Findings and purpose*

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

ing process *as a whole* (i.e., bilaterally arrived-at terms and conditions of employment for employees), and not just the assertion of management's position at the bargaining table, as being salutary for the functioning of the federal government.[22]

However, Congress did more in the Labor Statute than simply endorse the collective bargaining process as beneficial to the functioning of the federal government. It also took certain specific, concrete steps to assist the union component of that process. For example, Congress ensured that employing agencies would deduct union dues from employees' paychecks and transfer them to the union at no cost. 5 U.S.C. (Supp. V) 7115(a). Under Exec. order 11491, as amended, such a service had to be negotiated by the union and usually involved a charge being exacted by the employing agency for the service. *Information Announcement*, 1 F.L.R.C. 676, 677 (1973). Also, Congress expressly provided in the Labor Statute that agencies must furnish unions with data necessary for collective bargaining. 5 U.S.C. (Supp. V) 7114(b)(4). The Authority has ruled that Congress intended such data to be provided without charge to the union. *Veterans Administration Regional Office, Denver, Colorado*, 10 F.L.R.A. No. 78 (November 16, 1982).[23]

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[22] It has long been recognized that the collective bargaining process helps to eliminate employee frustrations resulting from the unilateral imposition of working conditions by employers, and the ensuing antagonism and work disruptions which invariably result from such frustrations. *See, e.g., H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 103 (1970); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 210-11 (1964); A. Cartter & F. Marshall, *Labor Economics* 365 (Rev. Ed. 1972) ("collective bargaining is preferable to . . . unilateral action by unions and employers"); D. Bok and J. Dunlop, *Labor and the American Community* 223 (1970) ("the sense of participation through bargaining serves to mitigate the fear of exploitation on the part of the workers").

[23] Congress also expanded somewhat the scope of bargaining under the Labor Statute over what it had been under Exec. order 11491, as amended. For example, certain prohibited subjects of bargaining under sec. 12(b)(5) of Exec. Order 11491, as amended,

Furthermore, in section 7131(a) of the Labor Statute, Congress expressly created the type of payment here involved—compensation payments to employees representing unions in the negotiation of a collective bargaining agreement. Congress thus intended to compensate employee union negotiators with public funds for the services they perform on the union side of the bargaining table. Congress effectively directed that the employee would be paid in the same manner as if the employee had performed his regularly assigned duties.

By undertaking these steps to assist the bargaining process as a whole, Congress rejected the view that public funding of only the management side of the bargaining table is in the public interest.[24] In this respect, it is un-

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were made permissively negotiable under sec. 7106(b)(1) of the Labor Statute, 5 U.S.C. (Supp. V) 7106(b)(1). Also, rights to negotiate on procedures and appropriate arrangements, not expressly referenced in the Executive order, were created in secs. 7106(b)(2), (3) of the Labor Statute, 5 U.S.C. (Supp. V) 7106(b)(2), (3).

[24] Both the Labor Statute itself and decisions of the Authority interpreting the language describe the limitations Congress intended to place on this assistance. For example, § 7131(a) of the Statute specifically limits the number of employee union representatives who can receive official time to the number of management representatives, a number designated by the agency. *National Fed'n of Fed'l Employees* v. *FLRA*, 652 F.2d at 194. That subsection also limits paid time to employees of a federal agency; thus, a negotiator on a union's own staff is not entitled under 7131(a) to be paid by a federal agency. Finally, by forbidding official time for internal union activities such as membership recruitment in § 7131(b) of the Labor Statute, Congress clearly drew the line between collective bargaining on the one hand, which does directly benefit government operation; and internal union matters, which Congress found do not.

Further, the Authority has held that to be eligible for official time under § 7131(a), an employee union representative must be a member of the bargaining unit involved in the negotiations. *Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 7 F.L.R.A. No. 118 (Jan. 22, 1982). The Authority also has held that official time is not available under § 7131(a) to negotiate local agreements

disputed that all expenses of management negotiators, including their salaries and travel expenses, are paid for by public funds (Pet. App. 43a). Congress simply intended to more equally apportion between union and management the extent to which the public fisc supports federal sector collective bargaining.[25] The intent of Congress to achieve some kind of parity in public support of the bargaining process in the federal government is further evidenced by the remarks of Congressman Clay at 124 Cong. Rec. 29,188 (1978), Legis. Hist. at 934, wherein he stated that employee union representatives "should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities." While no express reference was made to travel and per diem payments, the statement certainly supports the conclusion that both union and management negotiators are to be considered "on the clock," performing the government's work when negotiating an agree-

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supplementing a master agreement, since such local agreements are negotiated below the level of exclusive recognition. *Interpretation and Guidance*, 7 F.L.R.A. No. 105 (Jan. 15, 1982), *petit. for review filed sub nom. American Fed'n of Gov't Employees* v. *FLRA*, No. 82-1272 (D.C. Cir., petit. filed Mar. 15, 1982). Finally, the Authority has held that the use of official time by employee union negotiators to *prepare* for collective bargaining negotiations is a matter to be negotiated by the parties under § 7131(d) of the Labor Statute, as distinguished from the use of official time in the actual negotiation of a collective bargaining agreement which is expressly authorized by § 7131(a). *Headquarters, 323rd Flying Training Wing (ATC), Mather Air Force Base, California*, 3 F.L.R.A. 304 (1980).

[25] That the employer benefits as much from the collective bargaining process as does the union has been recognized by various state courts in the workmen's compensation area. Thus, employees injured while engaging in contract negotiations and grievance adjustment on behalf of a union have been held to act for the mutual benefit of employer and employees, and thus entitled to benefits. *Mikkelsen* v. *N.L. Industries*, 71 N.J. 209, 370 A.2d 5 (1977); *Herndon* v. *UAW Local No. 3*, 56 Mich. App. 435, 224 N.W.2d 334 (1974); *Kennedy* v. *Thompson Lumber Co.*, 223 Minn. 277, 26 N.W.2d 459 (1947).

ment, and therefore entitled to receive all compensation and reimbursements, consistent with that status.[26]

Given this clear effort by Congress to use federal funds to assist both the union and management components of the bargaining process, the Authority's determination concerning travel and per diem payments is consistent with Congress' intent in enacting the Labor Statute.[27] As indicated, Congress wanted an effective collective bargaining process in the federal government, and undertook certain steps to accomplish that goal. One step was to require as a matter of law that employee union negotiators be compensated by their employer while at the bargaining table.

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[26] Contrary to BATF's claim at Br. 35, fn. 24, Congressman Clay's remarks in this regard are entitled to consideration. The official time provision of § 7131(a) of the Labor Statute is identical to that contained in the House bill as reported out of committee. *See* p. 37, *infra*. The Congressman was a major proponent of that bill. 124 Cong. Rec. 25,600-601 (1978), Legis. Hist. at 842-43. Thus, while Congressman Clay may not have been in full accord with other aspects of the bill as enacted, such as the scope of bargaining eventually adopted, the section of the law now at issue is very much a direct product of his labors. Accordingly, his views are most relevant. *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 640 (1967).

[27] This Court has regularly reviewed decisions of the NLRB from the point of view of whether the Board's interpretation of the NLRA is "permissible," as opposed to "required," under that Act. *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975). The Court's inquiry has often been whether the Board's decision has entered into an area that is barred under the NLRA, as opposed to mandated by that Act. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). This emphasis on whether a Board decision is consistent with the Act, as opposed to expressly mandated by it, has been attributed to the Board's congressionally assigned role as the balancer of "conflicting legitimate interests" arising under the NLRA. *NLRB* v. *Int'l Bhd. of Teamsters*, 353 U.S. 87, 96 (1957); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 798 (1945). We respectfully submit that the Authority's decision should be viewed in the same light, as Congress intended the same general role for the Authority in the federal sector as it did for the Board in the private sector.

With Congress having taken this unprecedented action, the Authority reasonably decided that it would be anomalous indeed if Congress did not likewise intend to require employer payment of travel expenses to employee union negotiators. Otherwise, it would be more difficult for employee negotiators to reach the bargaining table and perform the function for which Congress intended to pay them.[28]

Accordingly, it must be concluded that the Authority acted reasonably and well within the scope of its discretion, as the agency responsible for overseeing the collective bargaining process in the federal government, in deciding that requiring travel and per diem payments as a corollary to official time for employee union negotiators is consistent with Congress' intent. The reasonableness of this holding is further supported by the fact that BATF is unable to demonstrate that requiring such payments violates any provision of law.[29]

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[28] The Authority's decision does not conflict with the cost-saving measures enacted by Congress in the travel area, referenced by BATF at Br. 18, fn. 11. Donald Pruett, the union negotiator who is the subject of the Authority's order at issue, would appear to be entitled to approximately $80.00 in mileage and part-day per diem under applicable regulations. There is, of course, no claim by BATF that it is incapable of making this payment. As to whether an agency has devoted insufficient travel funds to contract negotiations, as opposed to mission-related travel, such allegations can be dealt with on a case-by-case basis under the statutory unfair labor practice provisions, 5 U.S.C. (Supp. V) 7116 and 7118. At no time has the Authority held that an agency must commit more money to employee travel than has been approved by Congress.

[29] Contrary to BATF's assertion at 23, fn. 16, the Authority's holding is not inconsistent with BATF's right to determine its budget under 5 U.S.C. (Supp. V) 7106(a)(1). The Authority analyzed this right in *Office of Personnel Management*, 6 F.L.R.A. No. 76 (Aug. 19, 1981), *enforced sub nom. Office of Personnel Management* v. *FLRA*, No. 81-2106 (D.C. Cir. April 6, 1983). In that case, the Authority held that an agency's budget right would bar negotiations on a bargaining proposal that sought to prescribe a particular program or an amount of funds to be included in the

3. BATF and two courts have adopted the mistaken premise that the private sector model for the economic structure of collective bargaining, wherein both union and management are completely self-supporting institutions that pay their own way at the bargaining table, is applicable to the federal sector. Br. 20; *Florida National Guard* v. *FLRA*, 699 F.2d 1082, 1087 n.11 (11th Cir. 1983), *petit. for cert. filed*, No. —— (S. Ct. June 3, 1983); *Division of Military and Naval Affairs, State of New York* v. *FLRA*, 683 F.2d 45, 48 (2d Cir. 1982), *petit. for cert. filed sub nom. FLRA* v. *Division of Military and Naval Affairs, State of New York*, 51 U.S.L.W. 3596 (Dec. 16, 1982). However, private sector analogies must be applied in the federal sector only after careful consideration of the distinctions between the two sectors. *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1287 (D.C. Cir. 1983). The argument set forth at 27 to 32, *supra*, shows that private sector analogies are inapposite herein.

The monies to be paid to employee union negotiators are not those of the agency in any proprietary sense, as are the funds at the disposal of a private employer. Rather, the funds at a federal agency's command originate from the public treasury as a result primarily of the sovereign's revenue-raising power. A federal agency expends these public funds in the manner directed by Congress. United States Constitution, art. I, sec. 9, cl. 7; *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937).[30] As set forth at 27 to 32, *supra*, however, Con-

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agency's budget, or had the effect of causing a "significant and unavoidable increase in costs which would not be offset by compensating benefits." *Office of Personnel Management*, 6 F.L.R.A. No. 76, slip op. at 3-4. Obviously, the Authority's decision herein does not require BATF to establish a new program or request a specific amount of funds from Congress for travel, nor has there been a showing that BATF must significantly increase its net costs of operation as a result of the decision.

[30] In this regard, Congress routinely appropriates funds to federal agencies for the purpose of paying employees' travel and per diem expenses. For example, Congress appropriated approximately

gress in the Labor Statute intended to assist the union component of the bargaining process by means of public funds.[31] As a result, it is a mistake to view the issue simply in private sector terms, as management paying a union's travel costs. Indeed, during House debates on the Labor Statute, several Congressmen commented on the distinctions between private and federal sector unions, due to the wholly different nature of the employers involved. *See, e.g.*, 124 Cong. Rec. 29,196 (1978), Legis. Hist. at 950 (remarks of Congressman Lott); 124 Cong. Rec. 29,200 (1978), Legis. Hist. at 959 (remarks of Congressman Rousselot). The issue must instead be viewed in terms

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$132 million for "salaries and expenses" for BATF in fiscal year 1979, the year in which Donald Pruett incurred the travel and per diem expenses here involved. Treasury, Postal Service, and General Government Appropriation Act of 1979, Pub. L. No. 95-429, 92 Stat. 1001, 1002. A line item for "travel and transportation of persons," in the sum of approximately $6 million, was included in BATF's congressionally approved budget estimate for that year. *Budget of the United States Government, Fiscal Year 1979, Appendix*, at p. 732. It is presumably this source which supports BATF's disbursement of travel funds to its management representatives at the bargaining table, and also would support such payments to employee union representatives. For this reason the present case is readily distinguishable from *United States* v. *MacCollom*, 426 U.S. 317 (1976), cited at Br. 26, wherein an expenditure was to be made without any supporting appropriation.

[31] The limitations placed on this assistance have already been discussed at 29, fn. 24, *supra*. It only need be said further that BATF's observation at Br. 35, that the Authority's decision would support a conclusion that secretarial services, equipment, and the like must also be provided by agencies to unions, is without merit. The Authority's decision, in its simplest terms, was that payment of travel and per diem expenses is a proper corollary to paying a salary to employee union negotiators. In other words, once Congress decided to pay employees to perform a service, it was reasonable for the Authority to conclude that Congress likewise intended to pay their way to the place where the service is to be performed. The Authority has never indicated that it views such wholly different forms of support as suggested by BATF as within the purview of Congress' intent.

of the use of public funds to support the bargaining process at a whole.[32]

4. BATF's claim at Br. 21, that the Authority's decision serves to place "unequal pressure" on the parties to agree is without basis. In fact, just the reverse is true. As the Ninth Circuit recognized (Pet. App. 10a), by allowing employee union negotiators access to the same federal funds to which management negotiators have access, the pressures on the parties are more nearly equalized. In this regard, federal employee unions must finance their negotiating efforts from whatever dues monies they can collect.[33] Management negotiators, on the other hand, have access to considerably larger amounts of federal funds to support their bargaining efforts. If anything, the Authority's decision serves to reduce this inequality. The need of union representatives to produce an acceptable agreement for their constituency, as well as the statu-

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[32] Unlike the NLRA, the Labor Statute expressly provides for numerous substantive terms and conditions of employment that in the private sector would be subject to bargaining between the parties. *See, e.g.*, 5 U.S.C. (Supp. V) 7106 (statutory management rights provision); 7121 (compulsory binding grievance arbitration); 7131 (the official time provision here at issue). Even in the private sector, where employer payment of employee union negotiators' travel and per diem expenses is a mandatory subject of bargaining, it is recognized that such payments contribute to more effective collective bargaining representation. *Midstate Telephone Corp.* v. *NLRB*, 113 L.R.R.M. 2213, 2217 (2d Cir. 1983). Under the Labor Statute, such improved representation implements Congress' intent, as described earlier, to institute an effective collective bargaining process in the federal government.

[33] An agency or union shop is prohibited under the Labor Statute. *Department of the Army, U.S. Army Support Command*, 1 F.L.R.A. 562 (1979). As stated by one commentator regarding the Authority's Interpretation and Guidance:

> In the private sector where the agency or union shop is legal, the practice calls frequently for unions to reimburse its negotiators for lost pay. But the same practice cannot reasonably be expected to prevail on the same scale in a sector in which unions have less money because of voluntary unionism.

H. Robinson, *Negotiability In The Federal Sector* 173 (1981).

tory unfair labor practice provisions requiring good faith bargaining and the availability of the Federal Service Impasses Panel to assist in impasse resolution pursuant to section 7119, will spur the union to conduct its side of negotiations expeditiously.[34]

B. *The History Of Official Time And Travel And Per Diem Authorizations For Collective Bargaining Negotiations In The Federal Sector Supports The Authority's Determination*

1. The contrast between the Labor Statute and the Executive orders preceding it, as they deal with official time and travel and per diem authorizations also supports the Authority's conclusion. (Pet. App. 42a, fn. 6).

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[34] The claim of BATF (Br. 22-23) that the Authority's ruling will result in friction between unions and management, because management will have to monitor the manner, length, and point of origin of travel, is unfounded. Under the Authority's ruling, the Federal Travel Regulations, which deal exhaustively with the subject, would determine the manner of travel. As to the length of travel, the Authority has ruled that official time and travel and per diem are available under sec. 7131(a) only for the duration of the bargaining sessions themselves. *Headquarters, 323rd Flying Training Wing (ATC), Mather Air Force Base, California*, F.L.R.A. 304 (1980).

Finally, as to the location from which an employee union negotiator is drawn, it is within the discretion of both agencies and unions holding exclusive recognition to designate their respective representatives when fulfilling their statutory responsibilities. *U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio.* 4 F.L.R.A. No. 39 (Sept. 26, 1980). As mentioned *supra* n.19, in order to receive official time under § 7131(a) and thus be entitled to payment of travel and per diem expenses, an employee union negotiator must be a member of the bargaining unit involved in the negotiations. While thus recognizing a union's right to select its own employee negotiators, the Authority has additionally stated that "[t]his is not to say management may not by appropriate actions attempt to control its expenses incurred in negotions as, for example, through the establishment of mutually agreeable negotiation procedures, or ground rules which could include provision for pre-meeting exchange of written position statements." *Department of Health and Human Services, Region IV, Atlanta, Georgia*, 9 F.L.R.A. No. 150 at n.2 (Aug. 20, 1982).

As set forth in more detail at 2 to 6, *supra*, Exec. order 10988 did not view collective bargaining negotiations as being sufficiently in the government's interest to warrant expenditure of federal funds to support them. Exec. order 11491 originally preserved this prohibition, although it was amended to allow for limited amounts of official time for employee union negotiators. Travel and per diem payments were unauthorized. Several unsuccessful efforts were made during congressional consideration of the Labor Statute to enact the official time provision of Exec. order 11491, as amended. The House bill, as referred to committee, was identical in all relevant respects to the present section 7131(a). H.R. 11280, 95th Cong., 2d Sess. sec. 701 (1978), Legis. Hist. at 361. An effort in committee to substitute the Carter Administration's bill, which sought to simply codify the Executive order provision on, *inter alia*, official time, was defeated. 124 Cong. Rec. 25,601 (1978), Legis. Hist. at 844. Next, the full House defeated a proposed amendment by Congressman Collins which again sought to place the provisions of the order concerning, *inter alia*, official time in the Labor Statute. 124 Cong. Rec. 29,167; 29,202 (1978), Legis. Hist. at 903, 962. Finally, the Conference Committee rejected the Senate bill, which also sought to continue the order's policies. H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. at 111 (1978).

In addition to official time and travel and per diem, the Labor Statute also rejected the Executive order's view that collective bargaining was not in the government's interest. The benefits of the process for government operations were expressly recognized for the first time. Having recognized this change, in the context of Congress' dissatisfaction with the FLRC's stewardship of the Executive order, it was most reasonable for the Authority to conclude that travel and per diem payments are consistent with Congress' intent in enacting the Labor Statute. The refusal to make such payments under the Executive orders was always based on the premise that collective bargaining was primarily in the union's

interest. Once that premise was rejected by Congress, it was logical to infer that the prohibition against travel and per diem payments was discarded as well.

2. BATF claims (Br. 17-20) that Congress' presumed awareness of the Executive order prohibition on travel and per diem payments, coupled with its failure to expressly change the practice, reflects an intent to codify the prohibition. However, Congress' silence on this specific area can be read just as easily to support the Authority's determination as it can to prohibit such payments.

In September 1980, approximately one year after the Authority issued its Interpretation and Guidance, Congress amended 5 U.S.C. (& Supp. III) 5702 and 5704 to provide for increased maximum amounts payable for per diem, actual subsistence, and mileage expenses. Act of Sept. 10, 1980, Pub. L. No. 96-346, 94 Stat. 1148. The amendment also directed the Administrator of the General Services Administration to undertake various studies of travel in the federal government. However, at no point during its consideration of this legislation did Congress indicate disagreement with the Authority's view that employee union representative travel for negotiations constitutes "official business" under sec. 5702(a). This silence, which certainly is not dispositive of Congress' intent, can be viewed as congressional ratification of the Authority's holding as much as BATF would read Congress' earlier silence as support for the contrary conclusion.

Further, there are marked differences between the cases cited by BATF (Br. 17-20) and the present case. In the present case, Congress was legislating for the first time in an area previously governed exclusively by Executive action. Moreover, Congress found that executive action unsatisfactory. In addition, Congress in the Labor Statute completely reversed the policy of the Executive orders upon which the travel cost prohibition had always rested: namely, that collective bargaining is in the best interest of federal employee unions only, and not the gov-

ernment itself.[35] The General Accounting Office has also recognized that enactment of the Labor Statute effected substantial changes in the area of official time, such that its previous decisions on the subject are superseded by section 7131(a) to the extent of any conflict.[36] In the cases cited by BATF, on the other hand, there was no comparable repudiation by Congress of a past policy so integrally related to the issue under consideration. Accordingly, the general principles of statutory construction in which BATF places great stock are inapplicable in this case.

3. Considerable reliance is also placed by BATF, at Br. 25-26, 28, on the principle of statutory construction

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[35] Congress' reversal of this policy, and its specific change in sec. 7131(a) as to the amount of official time to be made available to employee union negotiators, calls into question the weight to be given Congressman Udall's statement quoted at Br. 19. While the Labor Statute can generally be said to have codified the "basic framework of collective bargaining" established in Exec. order 10988, the Labor Statute quite obviously effected substantial changes in that order's view of who benefits from collective bargaining in the federal government, and how much official time should be made available by the government for such bargaining.

[36] General Accounting Office Decision No. B-156287 (CFR) (June 15, 1981) states:

> The enactment of Chapter 71, Title 5, as Title VII of the Civil Service Reform Act of 1978, Pub. Law No. 95-454, October 13, 1978 (92 Stat. 1111, 1192), provided a specific statutory provision—5 U.S.C. 7131—for the use of official time in the labor-management area. This provision is more comprehensive and specific than the preexisting provisions of section 20 of Executive Order 11491, *supra*. In view of section 7135(b), providing for supersession of inconsistent provisions of the various Executive orders dealing with labor-management relations, we view section 20 of Executive Order 11491 as having been superseded by the specific provisions of section 7131 of title 5, United States Code. It follows, therefore, that our decisions interpreting the official time provisions of prior Executive orders have also been superseded by section 7131, to the extent of any conflict.

Slip op. at 2.

discussed in *United States* v. *Zazove*, 334 U.S. 602 (1948) and *Pine Hill Coal Co.* v. *United States*, 259 U.S. 191 (1922). Essentially, the principle provides that when a statute may be construed to allow the federal government to assume either greater or lesser amounts of financial liability, Congress' failure to specify clearly the construction resulting in the larger liability will be taken to reflect an intent to assume only the lesser liability, unless "cogent considerations to the contrary" warrant a different result. *United States* v. *Zazove*, 334 U.S. at 616-17.[37]

The principle is inapplicable here for two reasons. First, it has been applied to an extremely limited class of cases, wherein a statute dealing exclusively with financial matters (i.e., insurance benefits, prices of commodities, interest payments, etc.) is at issue.[38] The Labor

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[37] This principle appears to be for use solely in construing a statute where there is no question of the authorization of a government agency or official to expend the funds at issue. It is thus distinct from cases such as *United States* v. *MacCollom*, 426 U.S. 317 (1976), involving an authorization issue which has a constitutional dimension. *See* p. 34, fn. 30, *supra*. The principle is also distinct from the doctrine of sovereign immunity, under which the government may be sued only insofar as it consents to be sued. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). In this regard, the present case does not involve a suit against the sovereign or its agent. Rather, this case involves a federal agency's construction of the statute it administers as providing for certain payments, in furtherance of Congress' goals in enacting that statute. Sovereign immunity is inapposite to this kind of situation, and BATF's argument at Br. 27 is accordingly without merit.

[38] The very limited applicability of the principle is demonstrated by the fact that research discloses only six reported cases in which the principle as stated in *Zazove* and *Pine Hill Coal* has been applied: *Brookfield Construction Co.* v. *United States*, 661 F.2d 159, 163-64 (Ct. Cl. 1981); *Schellfeffer* v. *United States*, 343 F.2d 936, 942 (Ct. Cl. 1965); *Maryland Casualty Co.* v. *United States*, 155 F.2d 823, 826 (4th Cir. 1946); *Allen* v. *United States*, 547 F. Supp. 357, 360-61 (N.D. Ill. 1982); *Simmons* v. *United States*, 120 F. Supp. 641, 646-47 (M.D. Pa. 1954); and *Fogarty* v. *United States*, 80 F. Supp. 90, 96 (D. Minn. 1948), *aff'd*, 176 F.2d 599 (8th Cir. 1949), *aff'd*,

Statute obviously does not deal exclusively with financial matters, but rather is aimed at establishing an effective collective bargaining system in the federal government. The principle has never been extended to a case such as this, and no persuasive reason appears for beginning such a practice here.

Second, the principle is not to be applied mechanically. As the Court said in *Zazove*, it is necessary to consider the "full context of related sections of the statute and other indicia of legislative intent," such as legislative history, to determine the proper meaning of a statute. *Zazove*, 334 U.S. at 612. Further, other "cogent considerations" may warrant construing a statute to provide for a liability where there was no express statement from Congress. *Id.* at 617.

In the present case, much of what has already been said demonstrates "cogent considerations" for viewing the Authority's decision as consistent with Congress' intent. In sum, Congress in the Labor Statute rejected the long-held view of the executive branch and the Comptroller General, upon which the travel and per diem prohibition had been based, that collective bargaining benefits unions and not the government. Believing that the collective bargaining process benefits the government as a whole, Congress decided to compensate employee union negotiators for their services by ensuring that an employee would receive a normal day's pay for a day spent in bargaining. The Authority quite logically concluded that Congress also intended to provide the means to reach the site where the services are to be performed. Accordingly, notwithstanding congressional silence on the specific matter, the Authority's decision is consistent with Congress' intent, and nothing in *Zazove* or *Pine Hill Coal* warrants a different conclusion.

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340 U.S. 8 (1950). This Court has not applied the principle other than in *Zazove* and *Pine Hill Coal* themselves. Also, the principle has never been used to defeat an agency's interpretation of the statute it is responsible for administering.

III. Collective Bargaining Negotiations Constitute "Official Business" Of The Federal Government Within The Meaning Of 5 U.S.C. (& Supp. V) 5702, Thus Entitling Employee Union Negotiators To Travel Expenses And A Per Diem Allowance Under That Section

1. The Authority and the court below correctly decided that employee union negotiators are entitled to a per diem allowance and travel costs under 5 U.S.C. (& Supp. V) 5702, as well as under the Labor Statute itself.[39] Section 5702(a) of Title 5 of the Code provides in relevant part that "an employee while traveling on official business away from his designated post of duty . . . is entitled to . . . a per diem allowance." In applying section 5702, the Comptroller General has adopted the pragmatic standard of whether the purpose of the employee's travel is "sufficiently in the interest of the United States so as to be regarded as official business." 44 Comp. Gen. 188, 189 (1964). This standard encompasses more than travel which is directly related to an agency's mission. For example, travel and per diem payments have been made to employees to attend administrative hearings on their own suspensions from duty, personnel grievances, performance rating appeals, etc., on the theory that because such hearings are provided by law they must constitute "official business" of the government. 31 Comp. Gen. 346 (1952). *See also Vitarelli* v. *United States*, 279 F.2d 878, 882 (Ct. Cl. 1960); 33 Comp. Gen 582 (1952); 21 Comp. Gen. 382 (1941). The same benefit to the United States is derived from collective bargaining under the Labor Statute. It is a process provided by law, which has been deemed by Congress to be beneficial for the operation of the federal government. Thus, the Authority

[39] The origin of 5 U.S.C. 5702 is the Travel Expense Act of 1949, Pub. L. No. 81-92, 63 Stat. 166. The act has been amended on numerous occasions since 1949, primarily to increase the maximum amounts payable for travel and per diem costs. However, the relevant provisions discussed here concerning "official business" have remained unchanged since enactment of the 1949 law.

and the court below correctly concluded that collective bargaining under the Labor Statute is "official business" of the government under section 5702, in accordance with cases such as 31 Comp. Gen. 346 (1952).

Further, a considerable amount of official travel in the federal government is to attend conferences, seminars, conventions, etc., many of which are sponsored by private organizations. Comptroller General of the United States, *Travel in the Management and Operation of Federal Programs* 1, App. I at 5 (Rpt. No. FPCD-77-11, Mar. 17, 1977); Comptroller General of the United States, *Proposals for Improving the Management of Federal Travel* 1, 22 (Rpt. No. FPCD-81-13, Dec. 24, 1980). The benefit to the government from such travel would appear to be the ability of government employees to become informed of recent developments in a given subject area, and to use the newly-acquired information to make government more effective and efficient. Similarly, the give-and-take of negotiations on working conditions between agency management and union representatives results in a mutual understanding as to what the "rules of the shop" should be, thereby improving employee morale and productivity, and accordingly agency efficiency and effectiveness. Accordingly, both the Authority and the court below correctly concluded that Congress viewed collective bargaining under the Labor Statute to be "official business" of the federal government, consistent with the meaning of that term in 5 U.S.C. (& Supp. V) 5702.[40]

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[40] BATF's unsupported definition of "official business" (Br. 31) as "work done on behalf of an agency pursuant to a directive from an agency supervisor," would appear to be erroneous based on the foregoing. As indicated, the Comptroller General has viewed the "official business" provision of sec. 5702(a) broadly and flexibly, to encompass what is "sufficiently in the interest of the United States." 44 Comp. Gen. at 189. Further, in cases such as 31 Comp. Gen. 346 (1952), the Comptroller General has recognized that supervisory direction is not an indispensable element of "official business."

2. BATF and courts that have ruled against the Authority have cited the reference in section 7101(a) of the Labor Statute to collective bargaining being in the "public interest" and contributing to the "effective conduct of public business," and distinguished these benefits from the "interest of the Government as employer." Br. 33; *United States Department of Agriculture* v. *FLRA*, 691 F.2d 1242, 1248 (8th Cir. 1982), *petit. for cert. filed sub nom. FLRA* v. *Department of Agriculture*, 51 U.S.L.W. 3625 (Dec. 13, 1982). *See also Division of Military and Naval Affairs, State of New York* v. *FLRA*, 683 F.2d 45, 48 (2d Cir. 1982), *petit. for cert. filed sub nom. FLRA* v. *Division of Military and Naval Affairs, State of New York*, 51 U.S.L.W. 3596 (Dec. 16, 1982). This reasoning proceeds from an erroneous premise as to the benefit derived by the federal government from the collective bargaining process. Congress' intent in the Labor Statute was not to equate the interest of the government exclusively with the management point of view at the bargaining table. Rather, Congress intended the functioning of government to be the beneficiary of the effective operation of the collective bargaining process in its entirety, with contributions from both union and management. Accordingly, to focus on the "interest of the Government as employer" is inconsistent with Congress' intent.[41]

In sum, Congress viewed the "public interest" served by collective bargaining under the Labor Statute as being

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[41] BATF's argument at Br. 33, fn. 23, that collective bargaining is like other "public interest" activities recognized by the government (e.g., voting and donating blood) for which an employee may be excused from work, but does not receive travel and per diem, is without weight. Collective bargaining, unlike the cited activities, directly benefits the government itself by establishing work rules in such a way as to promote employee morale and job performance. As stated by Congressman Clay during floor debates on the Labor Statute, "[t]he public and the taxpayer deserve the more effective and efficient government that is a predictable result of a meaningful labor-management program for Federal agencies." 124 Cong. Rec. 29,187 (1978), Legis. Hist. at 931.

a more efficient and effective federal government. This kind of benefit for the government has consistently resulted in a finding that an activity is "official business" of the government under 5 U.S.C. (& Supp. V) 5702, thus warranting payment of travel and a per diem allowance.[42]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JUNE 1983

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[42] The claim of BATF at Br. 31, that the Authority's decision is counter to the determination of the Administrator of the General Services Administration that each agency head decide whether a given activity is "official business," is also without merit. The relevant regulation, entitled "Authority For Travel," states in pertinent part: "*Except as otherwise provided by law*, all travel shall be either authorized or approved by the head of the agency or by an official to whom such authority has been delegated. . . ." Federal Travel Regulations FPMR 101-7, GSA Bulletin FPMR A-40, Supp. 1, Chap. 1-1.4 (Sept. 28, 1981) (emphasis added.) The Labor Statute and the Authority's interpretation thereof concerning travel and per diem payments constitutes the requisite authorization for such payments.

STATUTORY APPENDIX

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR MANAGEMENT RELATIONS STATUTE

5 U.S.C. 7101 *et seq.*, 92 Stat. 1191

"§ 7101. Findings and purpose

"(a) The Congress finds that—

"(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

"(A) safeguards the public interest,

"(B) contributes to the effective conduct of public business, and

"(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

"(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

"(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

"§ 7105. Powers and duties of the Authority

"(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

"(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

"(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

"(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

"(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

"(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

"(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

"(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

"(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

"(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

"(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

§ 7116. Unfair labor practices

"(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

"(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

"(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

"(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

"(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

"(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

"(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

"(8) to otherwise fail or refuse to comply with any provision of this chapter.

"(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

"(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

"(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

"(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

"(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

"(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

"(7) (A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

"(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

"(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

"§ 7123. Judicial review; enforcement

"(a) Any person aggrieved by any final order of the Authority other than an order under—

"(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

"(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States of Appeals for the District of Columbia.

"(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

"(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall

be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

"(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this sec-

tion if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

"§ 7131. Official time

"(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

"(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

"(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

"(d) Except as provided in the preceding subsection of this section—

"(1) any employee representing an exclusive representative, or

"(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

RELEVANT PORTION OF THE TRAVEL EXPENSES ACT OF 1949, AS AMENDED 5 U.S.C. (& Supp. V) 5701 *et seq.*

5 U.S.C. (Supp. V) 5702(a)

Under regulations prescribed under section 5707 of this title, an employee while traveling on official business away from his designated post of duty, or in the case of an individual described under section 5703 of this title, his home or regular place of business, is entitled to (1) a per diem allowance for travel inside the continental United States at a rate not to exceed $50, and (2) a per diem allowance for travel outside the continental United States, that may not exceed the rate established by the President, or his designee, for each locality where travel is to be performed. For travel consuming less than a full day, such rate may be allocated proportionately.

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